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Statutory Changes Passed In H.647 That Effect The Resolution Of Disputed Workers' Compensation Claims

Procedural Changes Effective ON Passage – 06/01/2010.

21 V.S.A. § 643a. Discontinuance of Benefits

- The V.R. verification requirement is considered procedural, and therefore applies to ALL Form 27 discontinuances filed after June 1, 2010, regardless of when the original work injury occurred.

The statute provides:

*... The notice of intention to discontinue payments shall be filed on forms prescribed by the commissioner and shall include the date of the proposed discontinuance, the reasons for it, **and**, if the employee has been out of work for 90 days, a verification that the employer offered vocational rehabilitation screening and services as required under this chapter.*

This means that when a Form 27 is submitted the adjuster must verify:

- whether the claimant has been out of work 90 days (note – this does not require that claimant receive benefits for some or all of the 90 days, it only requires that claimant be out of work for 90 days). The adjuster must inform the division of how many days the worker has been out of work.
- that vocational rehabilitation services have been specifically offered the worker, if the worker has been out 90 days. Proof of the offer, and any claimant response, must be submitted with the discontinuance.



21 V.S.A. § 643a. Discontinuance of Benefits

The disclosure of all relevant evidence requirement is considered procedural and therefore applies to ALL Form 27 discontinuances filed after June 1, 2010, regardless of when the original work injury occurred.

The statute provides:

... All relevant evidence, including evidence that does not support discontinuance in the possession of the employer not already filed, shall be filed with the notice.

This means that when a Form 27 is submitted the adjuster must:

- a. include with the submission and identify all evidence supporting the discontinuance, and
- b. include with the submission all evidence in the insurer's possession that does not support the discontinuance;
- c. if the adjuster is relying on evidence previously submitted to the department, the adjuster must specifically identify that evidence and indicate when it was submitted.
- d. In some claims, this may be a considerable amount of material. To save paper and shipping costs, submit the information on a readable disk. If submitted on a disk please index or provide the records in chronological order. The adjuster must identify and may wish to highlight the specific evidence it is relying on to discontinue a benefit in order to lessen the chance that the evidence could be overlooked in the review process.

“Relevant evidence” includes all written materials that arguably support claimant's claim, whether they are written witness statements, doctor's notes, or an investigator's notes, in addition to all written materials that arguably support the proposed discontinuance.

“Relevant evidence” also includes any audio or video recordings whether the recordings support the claim or support the proposed discontinuance.

Since the W.C. rules prohibit any action being taken based solely on an oral (unwritten, not taped) report, the W.C. & Safety Division will not require submission of notes concerning telephone conversations etc.

EXEMPTION to the disclosure requirement: The insurer is not required to turn over material protected by the attorney client privilege, or material that is clearly attorney work product, but such material may not serve as the basis for any discontinuance unless it is disclosed.

Substantive Changes Effective On Passage – 06/01/2010

– the new standard for evaluating discontinuances

21 V.S.A. § 643a -- Discontinuance of Benefits -- provides in pertinent part:

If, after review of all the evidence in the file, the commissioner finds that a preponderance of all the evidence in the file does not reasonably support the proposed discontinuance, the commissioner shall order that payments continue until a hearing is held and a decision is rendered. Prior to a formal hearing, an injured worker may request reinstatement of benefits by providing additional new evidence to the department that establishes that a preponderance of all evidence now supports the claim. If the commissioner's decision, after a hearing, is that the employee was not entitled to any or all benefits paid between the discontinuance and the final decision, upon request of the employer, the commissioner may order that the employee repay all benefits to which the employee was not entitled. The employer may enforce a repayment order in any court of law having jurisdiction.

The Division has determined that the change from the current "evidence that reasonably supports standard" to the "preponderance of the evidence" standard is a substantive change that will directly impact the payment of benefits and issuance of an interim order. Under the new provision, the insurer must submit sufficient evidence to demonstrate that its discontinuance would prevail at the formal hearing level.

Since this is a substantive change, it will apply to all cases involving work injuries occurring on or after June 1, 2010. (**Note:** this new standard applies to Form 27 Discontinuances. The new standard does not apply to Form 2 Denials -- those will continue to be evaluated using the reasonableness standard.)

Remember – “Ties” go to the claimant. Because the insurer has the evidentiary burden, if the Division can’t decide whether the insurer’s evidence outweighs the evidence supporting the claimant, the Division must ORDER benefits to continue. In such cases, after the order is issued, the insurer may request that the matter be referred to the formal hearing docket in the same manner that such requests are made now. .